Lim Bay Bee v Jayabalan a/l Muniandy

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO MT3–12–277 OF 2006
NIK HASMAT JC
1 NOVEMBER 2010

Tort — Negligence — Contributory negligence — Motor vehicle accident — Claim for general and special damages for pain and suffering and loss of amenities — Whether plaintiff proved that defendant contributorily negligent — Whether testimony of parties consistent with evidence adduced

The plaintiff's claim against the defendant arose from a motor vehicle accident where the plaintiff's motorcycle collided with the defendant's motorcar. The plaintiff claimed for general and special damages for pain and suffering and loss of amenities. The sessions court judge held that the plaintiff on a balance of probabilities had failed to prove that the defendant was negligent and liable for the accident and accordingly dismissed the plaintiff's claim. Hence the appeal by the plaintiff against the decision of the learned sessions court judge in respect of the finding of liability and the quantum of award.

Held, allowing the plaintiff's appeal:

(1) Based on the parties' oral testimonies, documentary evidence namely the sketch plan, the police report of both parties and the damages to both vehicles involved in the accident, on a balance of probability, it was probable that the collision was contributed by the negligence of the defendant who, in avoiding a motorvan from the opposite direction that was turning into Jalan Tepi Sungai had collided into the plaintiff's motorcycle (see para 8).

(2) It was clear to the court that both parties had presented conflicting versions of the actual cause of the collision. However the court found that the plaintiff's version of the accident to be more probable and credible. The plaintiff gave a clear narration of the events leading and surrounding the accident which was consistent with the evidence in the sketch plan and the nature of damages to the vehicles involved in the accident. On the other hand, the defendant's testimony was inconsistent with evidence in the sketch plan and the evidence of damages to the vehicles (see para 11).

(3) The nature of the damages to both vehicles was consistent with the plaintiff's version of the accident. The damage was consistent with a head on collision and not, as contended by the defendant, whilst the plaintiff

was turning into the right. Accordingly, the plaintiff had succeeded to prove contributory negligence on the part of the defendant and hence the defendant was held accountable and jointly liable for the accident (see paras 18–19).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan timbul daripada kemalangan jalanraya di mana motosikal plaintif telah berlanggar dengan motokar defendan. Plaintif menuntut gantirugi am dan khas bagi kesakitan dan penderitaan dan kehilangan kebolehan mental. Hakim mahkamah sesyen memutuskan bahawa plaintif, atas imbangan kebarangkalian, telah gagal membuktikan defendan cuai dan bertanggungan ke atas kemalangan dan menolak tuntutan plaintif. Plaintif merayu terhadap keputusan hakim mahkamah sesyen berkenaan penemuan terhadap liabiliti dan kuantum award.

Diputuskan, membenarkan rayuan plaintif:

(1) Berdasarkan keterangan lisan pihak-pihak, keterangan dokumentar iaitu rajah kasar, laporan polis oleh kedua-dua pihak dan kerosakan-kerosakan kepada kedua-dua kenderaan yang terlibat di dalam kemalangan, atas imbangan kebarangkalian, terdapat kemungkinan bahawa kemalangan turut disumbang oleh defendan yang, dalam mengelak motorvan dari arah bertentangan yang membelok ke Jalan Tepi Sungai, telah berlanggar dengan motosikal plaintif (lihat perenggan 8).

(2) Adalah jelas kepada mahkamah bahawa kedua-dua pihak telah menghujahkan versi-versi bertentangan mengenai sebab sebenar berlakunya pelanggaran. Walau bagaimanapun, mahkamah mendapati bahawa versi plaintif lebih mungkin dan boleh dipercayai. Plaintif telah memberi pengisahan jelas akan kejadian yang menyebabkan dan suasana kemalangan yang konsisten dengan bukti dalam rajah kasar dan keadaan kerosakan-kerosakan ke atas kenderaan-kenderaan yang terlibat dalam kemalangan. Di samping itu, keterangan defendan tidak konsisten dengan bukti dalam rajah kasar dan bukti kerosakan-kerosakan ke atas kenderaan-kenderaan (lihat perenggan 11).

(3) Keadaan kerosakan-kerosakan ke atas kenderaan-kenderaan adalah konsisten dengan versi plaintif mengenai kemalangan tersebut. Kerosakan adalah konsisten dengan kemalangan dan tidak, seperti yang dihujahkan oleh defendan, ketika plaintif membelok ke kanan. Oleh yang demikian, keterangan defendan adalah tidak konsisten dengan bukti di dalam rajah kasar dan bukti kerosakan-kerosakan ke atas kenderaan-kenderaan (lihat perenggan 18–19).]

Notes

For cases on contributory negligence, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 880–931.

Cases referred to

Mohamad Khirul Mizan bin Shafie & Anor v Yue Ah Kai [2002] 6 MLJ 471, HC (refd)
Tan Kheng Kuan v Lim Chen Teik & Ors [1965] 1 MLJ 116 (refd)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22, SC (refd)

Batu Malay (Batu Malay & Associates) for the plaintiff.
Md Arif bin Abu Bakar (Azim, Tunku Farid & Wong) for the defendant.

Nik Hasmat JC:

BACKGROUND FACTS

[1] This is the plaintiff's appeal against the decision of the learned sessions court judge, Klang on 6 July 2006 which dismissed the appellant/plaintiff's action against the respondent/defendant for damages in respect of injuries suffered in a motor vehicle accident on 11 August 1999. The plaintiff's appeal was in respect of the sessions court finding of liability against the plaintiff and the quantum of award.

[2] The plaintiff's claim is for general and special damages for the pain and suffering and loss of amenities sustained by the plaintiff arising from a collision between the plaintiff's motorcycle and defendant's motorcar in a motor vehicle accident on 11 August 1998. The accident which occurred at 4.30pm at the junction of Jalan Barat/Jalan Tepi Sungai had involved a motorcycle BDY 2505 ridden by the plaintiff and a car bearing registration number WDJ 8456 owned and driven by the defendant. On the date of the accident, the plaintiff was riding his motorcycle along Jalan Raya Barat from the direction of Bukit Jawa/Klang whilst the defendant's car was travelling from the opposite direction, Jalan Telok Pulai to Jalan Bukit Jawa/Klang.

THE SESSIONS COURT'S JUDGMENT

[3] The plaintiff on a balance of probabilities had failed to prove that the defendant was negligent and liable for the accident and accordingly dismissed the plaintiff's claim. The court however awarded general and special damages for the plaintiff in the following:

(a) General damages

(i) Diasthesis syphysis pubis and diasthesis of right sacroiliac joint — RM35,000

(ii) Anterior bladder wall rupture — RM20,000

(iii) Osteoarthrirtis — RM50,000

(iv) Scars — RM7,000

(b) Special damages

(i) Loss of earning capacity — RM43,200

(ii) Medical expenses — RM2,750

COURT FINDING

[4] I find that the defendant's negligence had contributed to the accident and accordingly, hold the defendant jointly liable for the accident. In my view, the decision of the sessions court judge in dismissing the plaintiff's action is against the weight of evidence and accordingly, allowed the plaintiff's appeal and held that both parties were jointly at fault and contributed to the accident and liability at 50:50 with costs.

THE PLAINTIFF'S VERSION

[5] The plaintiff contended that the defendant was wholly negligent in encroaching into the path of the plaintiff's motorcycle which was in a stationary position at point Z of the sketch plan at exh P1. According to the plaintiff, he was following a motorvan in front of him for about two minutes and for a distance of 20 feet along B–C before stopping at the junction at point Z as he had intended to turn right into Jalan Tepi Sungai. The plaintiff further contend that the defendant had swerved and collided into the plaintiff's motorcycle at point Z whilst the defendant was attempting to avoid the motorvan which was turning right into Jalan Tepi Sungai.

THE DEFENDANT'S VERSION

[6] The defendant contended that the accident occurred in her lawful path when the plaintiff's motorcycle which came from the opposite direction was in the midst of turning into Jalan Tepi Sungai and had collided into the front right side to her car. The defendant admitted that at the time of accident, there was a motorvan travelling in front of, and from the direction of the plaintiff which had turned to the right into Jalan Tepi Sungai.

GROUNDS OF JUDGMENT

[7] There were clearly two diametrically opposing version of the occurrence of the accident. The learned sessions judge find that the plaintiff had wrongfully encroached into the defendant's lawful path whilst turning towards

A the right junction into Jalan Tepi Sungai, and is therefore wholly liable for the accident. In so finding, the judge heavily relied on the presence of the broken glass on the right side of the road at point E of the sketch plan at P1 to support his finding that the accident had occurred in the defendant's lawful path. The judge rejected the plaintiff's contention that the collision occurred at point Z
B as exh P1 did not disclose any evidence of collision at the said location.

[8] Based on parties oral testimony, documentary evidence namely the sketch plan, the police report of both parties and the damages to both vehicles involved in the accident, I am of the view that on a balance of probability, it was
C probable that the collision was contributed by the negligence of the defendant who, in avoiding a motorvan from the opposite direction that was turning into Jalan Tepi Sungai had collided into the plaintiff's motorcycle. In this regard, there is a conflicting version as to whether, at the material time of the accident, the plaintiff was in a stationary position at point 'Z' or as was contended by the
D defendant, in the midst of turning right into Jalan Tepi Sungai.

[9] According to the defendant, she first sighted the motorvan which was travelling from the opposite direction from a distance of 40 feet where she
E testified that the van had made a sudden turn to the right without any signal and the defendant had slowed down her car. She had testified that both the motorvan and the plaintiff's motorcycle was in the right lane B–C which was meant for vehicles turning to the right. After the van had turned into Jalan Tepi Sungai, she had continued driving and whilst in her lawful path, the plaintiff's
F motorcycle had collided into her car. The defendant however conceded that due to the size of the van, she was unable to see the plaintiff's motorcycle following behind the motorvan and only first sighted the plaintiff's motorcycle in a turning position towards Jalan Tepi Sungai from a distance of ten feet.

G **[10]** As for the plaintiff's version, it was contended that the collision occurred whilst the plaintiff's motorcycle was in a stationary position at point Z and the defendant had attempted to avoid a motorvan which was in front of the plaintiff. The motorvan at the material time was said to be turning to the right at point Q towards Jalan Tepi Sungai. The plaintiff could not see the
H defendant's car before as the motorvan in front of him had obstructed his view of vehicles coming from the opposite direction.

[11] It was clear to the court that both parties had presented conflicting version of the actual cause of the collision. However, in allowing the plaintiff's
I appeal, and holding the defendant equally negligent for the accident, I find that the plaintiff's version of the accident probable and credible. The plaintiff gave

clear narration of the events leading and surrounding the accident. The plaintiff's contention that the collision occurred at point Z whilst the plaintiff was in a stationary position and that the collision was caused by the defendant who was avoiding a motorvan, is consistent with the evidence in the sketch plan and the nature of damage to the vehicles involved in the accident.

[12] Based on the sketch plan in P1, the location of the broken pieces of glass at point E and other evidence of the occurrence of the collision at D, P, O, O1 the collision appear to have occurred in the defendant's lawful path and indicate that the plaintiff had caused the collision. However, based on the plaintiff's clear testimony of what happened during the accident, it was possible that the collision did not take place in defendant's path despite the presence of the broken glass and other evidence of the occurrence of collision. According to the plaintiff, during the accident, he had fallen to the right of the road and his motorcycle was flung to point D, the plaintiff's motorcycle rested at point O1 and the defendant's car rested at P. The plaintiff had clearly explained in court that during the accident, the plaintiff and his motorcycle was flung into the defendant's lawful path at point P and that after the collision, both vehicles had rested at point E. In this regard, I accepted the plaintiff's version of the collision and there was no reason to doubt the credibility of the plaintiff. In the case of *Mohamad Khirul Mizan bin Shafie & Anor v Yue Ah Kai* [2002] 6 MLJ 471, it was held:

> … They had been cross examined and their testimony remained unshaken. Evidence regarding the nature of the damage to the two vehicles were all consistent with the plaintiff's version …

I am of the view that point E was probably not the point of collision between the two vehicles and that the presence of the glass splinters and other evidence of collision in the defendant's lawful path is not a conclusive indicator of the plaintiff's liability for the accident.

[13] In this regard, the defendant's contention that at the time of the accident, the plaintiff was in the midst of turning to the right and had encroached into the defendant's lawful path is inconsistent with the evidence in the sketch plan in P1 and the evidence of damage to the vehicles. According to the investigating officer PW1, the broken glasses found on the road at E were from both vehicles and, the presence of such glass at merely five meters to the right of the junction of point Z support the plaintiff's version that the accident could have probably occurred at point Z whilst the plaintiff was in a stationary position. Further, there was no evidence of broken glass before the entrance of Jalan Tepi Sungai to support the defendant's version that at the time of the accident, the plaintiff was in the midst of turning into the said road. In this

regard, the plaintiff had given evidence that at the time of the accident, the defendant had attempted to avoid the motorvan that was at point Q whilst the van was turning to the right. Therefore, if the accident occurred in the manner as was contended by the defendant, surely the collision between both vehicles and evidence of broken glass from the vehicles and other evidence of the collision would have been visibly apparent at point Q or at the junction leading to the entry of Jalan Tepi Sungai and not concentrated in the defendant's path.

[14] All the evidence of the occurrence of the collision, namely the location of the broken glasses at point E, the location of the vehicles 'resting' place after the accident at point P and O and the location of the plaintiff after the accident at point O1, supported the plaintiff's contention that the collision could have possibly occurred at point Z whilst the plaintiff's motorcycle was stationary and had not physically turned to the right to enter Jalan Tepi Sungai. It was also clear to the court that as there was no junction for the plaintiff to turn into Jalan Tepi Sungai, it is inherently improbable that point E was the point of impact of the two vehicles.

[15] In her testimony, the defendant had confirmed the presence of a large motorvan from the opposite direction which had turned at a fast speed into Jalan Tepi Sungai and had blocked the defendant's view of the plaintiff. Although the defendant had given evidence that she had slowed down for the motorvan, in failing to avoid the collision with the plaintiff, the defendant had clearly failed to keep a proper lookout for other vehicles from the opposite direction potentially 'shielded' by the relatively large motorvan and consequently failed to anticipate the presence of the plaintiff who was travelling right behind the motorvan. On evidence, the motorvan was a relatively large van measuring two meters in width and two meters in height and the defendant accordingly, owe a special duty of care to foresee and anticipate the likely presence of other vehicle travelling from behind the 'large' motorvan. The onus is on the defendant driver to prove that she was not negligent and had not caused the accident. On the facts, she had failed to disprove negligence as despite the van crossing her path from the opposite direction, the defendant had proceeded with her journey without keeping a proper lookout and without first ensuring that the road ahead was clear for her to proceed.

[16] Based on the case of *Tan Kheng Kuan v Lim Chen Teik & Ors* [1965] 1 MLJ 116, it was held:

> ... It is a grave fault in motor driving to turn a vehicle across the general traffic without first seeing that there is a clear passage available. The act of turning across

A

> the line of incoming traffic is one which imposes a special duty of care which is not necessarily discharged by giving the conventional signal of intention to *deviate* …

[17] The evidence relating to the likely point of impact and exact location of the collision, the nature and extent of the damage to both vehicles, location of the broken glasses on the road, the location where the plaintiff was found on the road and the location of the 'final' resting place of both vehicles indicate that it was probable that the collision had occurred at point Z and in the manner as was contended by the plaintiff.

B

C

[18] The nature of the damage to both the vehicles involved in the accident is consistent with the plaintiff's version of the accident. The damage to the front right side of the defendant's car and the front right bumper of the plaintiff's motorcycle is consistent with a head on collision and not, as contended by the defendant, whilst the plaintiff was turning into the right. Accordingly, the plaintiff have succeeded to prove contributory negligence on the part of the defendant.

D

[19] Therefore, based on the above grounds, the appeal of the plaintiff with regard to the liability is allowed with costs. The plaintiff have succeeded to prove contributory negligence against the defendant and accordingly, the defendant is held accountable and jointly liable for the accident.

E

[20] On the question of quantum of damages awarded by the trial judge, I am in agreement with the quantum of award allowed by the learned sessions court judge. In the case of *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22, Dato' Abdull Hamid J, held:

F

> The principle which should guide the court in determining whether it should interfere with quantum of damages is crystal clear. Much depends on the circumstances of each case, in particular the amount of the award. In a particular case therefore it is for the appeal court to consider in the light of the circumstances of the case there is an erroneous estimate of the amount of damages in that either there was an omission on the part of the judge to consider some relevant materials or he had admitted for purpose of assessment some irrelevant consideration. If the court is satisfied or convinced that the judge has acted upon wrong principles of law then it is justified in reversing; indeed, it is its duty to reverse the findings of the trial judge.

G

H

I

[21] In the light of the circumstances of this case, the judge had accordingly considered the relevant consideration for the damages awarded and in my view, the award is a fair sum to compensate the plaintiff for the injuries sustained and loss of amenities suffered.

Plaintiff's appeal allowed.

Reported by Masrifah Ravendran